Supreme Court, U.S.
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No. ~~03~~ 1 0 8

In The
Supreme Court of the United States

MARILYN MOE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

J. ADAM MOORE
JUDSON R. MOORE
217 N. 2nd Street
Yakima, WA 98901
Telephone (509) 575-0372
Facsimile (509) 452-6771

MARK E. VOVOS
Counsel of Record
1309 West Dean Avenue
Suite 100
Spokane, WA 99201
Telephone (509) 326-5220
Facsimile (509) 326-5226

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Should the governing principles of Federal law regarding the competition between the FTCA and the FECA now be clarified, so that the locus of the injury or wrong is unimportant, to the end that all claims advanced by federal civil servants injured in the workplace are treated procedurally the same regardless of in which Federal Circuit they arise?

2. When FTCA suits alleging injury to a federal employee are filed, and the Government asserts the affirmative defense of FECA exclusivity, by what standard should the Court, in ruling on a Motion to Dismiss, determine whether the injury arose in the "performance of duty"?

3. Is there a conflict among the Circuits regarding that standard?

4. If a conflict exists, how should it be resolved so that a uniform standard will prevail throughout the Circuits?

5. Should the chosen standard be:

   a. The "Zone of Danger Test" (also known as *Cutler's* Rule) of the First, Fourth, Fifth and Sixth Circuits; or,

   b. Reference of the determination of the "performance of duty" issue to the Secretary of Labor, according absolute deference to that agency's determination, and permitting a later FTCA lawsuit only in the event of an administrative rejection, as in the Tenth Circuit; or,

   c. With respect to claims of emotional distress without physical injury, allowing the FTCA suit to proceed without regard to FECA exclusivity, as in the Ninth Circuit?

QUESTIONS PRESENTED FOR REVIEW – Continued

6. Was the case of *Sheehan v. United States*, 896 F.2d 1168, amended by 917 F.2d 424 (9th Cir., 1990), which permits an FTCA suit to proceed without regard to FECA exclusivity where emotional harm occurs without physical injury, wrongly decided by the Ninth Circuit, requiring that it be reversed?

7. In the opinion below, *Moe v. United States*, No. 02-35198, the Ninth Circuit decided this case in a manner that did not overrule *Sheehan*, *supra*, but sacrificed the principle that "the initial wrong is the cause of all that follows." Should that Ninth Circuit opinion also be reversed?

8. Should this Court overrule the opinion below, and adopt as its "performance of duty" standard *Cutler*'s Rule, limiting FECA coverage only to harm caused by a federal employee's regular or specially assigned work duties or to requirements imposed by the employment?

9. Consistent with the sea-change in our social norms regarding individual privacy and security in the face of the terrorist threat, should this Court now conduct a comprehensive examination of the procedures by which victims of mass assault or terrorism seek compensation for harm occurring at their federal workplace?

PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceedings in this case in the United States Court of Appeals for the Ninth Circuit:

1. Marilyn Moe, Appellee-Petitioner
2. J. Adam Moore and Mark E. Vovos, Attorneys for Appellee-Petitioner
3. United States of America, Appellant-Respondent
4. ROBERT D. McCALLUM, Jr.
   Assistant Attorney General

   MARK B. STERN
   (202) 514-5089

   JONATHAN H. LEVY
   (202) 353-0169
   Attorneys, Appellate-Respondent Staff,
   Department of Justice
   601 D Street, N.W.
   Washington, D.C. 20530-0001

   JAMES A. McDEVITT
   United States Attorney
   Eastern District of Washington
   W. 920 Riverside
   Suite 340
   Spokane, WA 99210
   (509) 353-2767

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The opinion of the United States Court of Appeals for the Ninth Circuit in case no. 02-35198 reversed the decision of the United States District Court for the Eastern District of Washington, which had denied the Respondent's motion to dismiss for lack of subject matter jurisdiction and subsequent motion for reconsideration. Thereafter, the parties jointly agreed to submit this case to the Ninth Circuit on interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). That Court issued a published Opinion dated April 18, 2003, reprinted here as Appendix 1-8. The district court's March 23, 2001 Order Denying Motion to Dismiss, *inter alia*, and its December 12, 2001 Order Certifying this case for Interlocutory Appeal, are printed here as Appendix 11-20 and Appendix 26, respectively.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit entered on April 18, 2003, and regarding which the Ninth Circuit Court of Appeals denied Petitioner's Motion for Rehearing en banc on June 5, 2003. (App. 27).

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE STATUTES AND REGULATIONS

1. The statutes applicable to this case are as follows:

Federal Employees' Compensation Act (FECA)

General Rule

Compensation for disability or death of employee

(a) The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. . . .

– 5 U.S.C. § 8102

Definitions

For the purpose of this subchapter –

(1) "employee" means –

(A) a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

(B) . . . .

(C) . . . .

(D) . . . .

(E) . . . .

(2) . . . .

(3) . . . .

(4) . . . .

(5) "injury" includes, in addition to injury by accident, a disease proximately caused by the employment, and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services;

– 5 U.S.C. § 8101

Limitation on right to receive compensation: FECA Exclusivity

(a) . . . .

(b) . . . .

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages . . . .

– 5 U.S.C. § 8116

Review of Award: Finality of Administrative Determination

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

The Secretary, in accordance with the facts found on review, may –

(1) end, decrease, or increase the compensation previously awarded; or

(2) award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is –

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Credit shall be allowed in the accounts of a certifying or disbursing official for payments in accordance with that action.

– 5 U.S.C. § 8128

Federal Tort Claims Act (FTCA)

United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) . . . .

– 28 U.S.C. § 1346

Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

– 28 U.S.C. § 2401

STATEMENT OF THE CASE

Basis for Federal District Court Jurisdiction:

Petitioner, Marilyn Moe ("Moe"), brought suit against Respondent, the United States of America, pursuant to

the Federal Tort Claims Act, 28 U.S.C. § 1346, *et seq.* Jurisdiction in the United States District Court for the Eastern District of Washington was alleged pursuant to 28 U.S.C. § 1331.

Facts Material to Consideration of the Questions Presented:

Marilyn Moe was a civilian employee of the Airforce, assigned to the family practice clinic at the Fairchild Airforce Base, at Spokane, Washington. On June 20, 1994, while working in her office near the pediatric clinic, an announcement came over the public address system that a gunman was in the building. What was happening was absolutely senseless, violent and terrifying. Dean Mellberg, a separated airman, had recently been released from a 90 day stay in a military psychiatric ward in Texas, his Airforce career in ruins. He had been sent there from the Fairchild AFB hospital by two doctors who had questioned his mental stability and fitness for duty.

Mellberg had penetrated base security with a concealed rifle that morning, intent on murdering those doctors. He entered the clinic by stealth, and stalked and killed the doctors in their second floor offices, one by one. The first shot that rang out killed the psychologist and the next killed the psychiatrist down the hall.

Marilyn Moe's routine clerical duties that morning were disrupted by two panicked hospital staff people who came running through her area to the exit, declaring that there was a gunman right behind them. Marilyn immediately followed, at a dead run, just as Mellberg pushed open a fire door with his body, affording him a clear shot at Marilyn. He aimed in her direction, and shot out the glass

window right beside the emergency doors through which she was trying to escape. Certain that he was pursuing, stalking, hunting her as his next victim, she ran across a parking lot and dove into some bushes for cover. She lay motionless, pretending to be dead, watching another woman running, then falling, after having been shot.

After shooting his doctors, Mellberg went on to kill two more people, and wound twenty-three others; men, women and children, most of them patients of the family practice clinic. When he ran out of bullets, he was shot and killed by a military policeman.

Marilyn Moe was not shot, but she was traumatized and suffered post-traumatic stress disorder (PTSD) from the incident. She was plagued by intrusive recollections of what did happen and what else could have happened. She began experiencing nightmares almost immediately, with one or two nightmares a night. She would wake up crying, fearful that an intruder was in her home. In recounting a typical nightmare, she stated: "I can see his face, he's in dark clothing, he's smiling and I'm in the room, the only thing in the room, and I'm crouching in the corner looking up at him . . . [with] the barrel of the gun pointed at me." (App. 41).

Once, while she was grocery shopping, she thought she heard a gun discharge and jumped under the vegetable counter, and hid there, crying, until she learned someone had dropped a bottle of Coca-Cola.

She began leaving a hall light on at night, and always planned an escape route from her bedroom before she was able to go to sleep. When asleep, she experienced sleep disturbance. Her PTSD aggravated her pre-existing ulcerative colitis, requiring the removal of her colon.

The Government filed a letter from Dr. Paul Wert, a psychologist, as part of the submissions on this Appeal (App. 37-46). Dr. Wert's letter, dated July 24, 1995, states in part as follows:

> In the months following the incident at Fairchild, Marilyn experienced problems with ulcerative colitis, which was originally diagnosed 12 years ago. Subsequent to June 20, 1994, she experienced a serious "episode." Within one month her weight went from 126 pounds to 98 pounds. She was hospitalized at Sacred Heart Medical Center for one week. She was then sent home for four to five days. The medication which was prescribed was not effective, however, and in December of 1994 she underwent an ileostomy. She underwent a recovery period in January. From March through June of this year she also has experienced considerable hair loss. The etiology of this is unknown. In general, however, she felt it was "all the stress, I was really under a lot of stress there for six months."
>
> (App. 43-44).

Additional facts and a description of petitioner-appellee's legal theories, which survived the government's 12(b)(6) Motion, can be found at *Sigman v. United States*, 208 F.3d 760, *amended by*, 217 F.3d 785 (9th Cir., 2000), an earlier appeal regarding the sovereign immunity defense raised against all of the injured claimants. Following that appeal, all cases were mediated and settled, with the exception of the Moe claim.

Ms. Moe had joined the others in pursuing a FTCA remedy. She relied upon the Ninth Circuit case of *Sheehan v. United States*, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir., 1990), which permitted FTCA lawsuits involving

mental distress suffered by civilian government employees as a judicially created exception to FECA exclusivity. Without overruling *Sheehan v. United States*, *supra*, the Ninth Circuit has now ruled that Ms. Moe's only recourse was an administrative claim under the federal workman's compensation system, (herein referred to as FECA) because her emotional injuries mutated into physical injuries, thus falling outside of *Sheehan's* holding. (App. 4-7).

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

I.

There is irreconcilable conflict among the Circuit Courts of Appeals regarding the availability of procedural and jurisdictional remedies available to federal employees claiming to have suffered emotional harm at or near their place of employment, injured by Governmental misfeasance. This conflict is of sufficient importance to merit review by the Supreme Court.

The Circuits that have addressed the issue fall into the following conflicting alignments:

1. The First, Fourth, Fifth and Sixth Circuit Courts of Appeals have adopted the "Zone of Danger" test to determine whether a worker was injured "while in the performance of duty." The mere fact that the injury occurred while the employee was on the premises of his federal employer is not controlling; rather, a risk analysis determines whether the injuries were connected to the usual and expected hazards of the particular job

performed. If they were, the employee must proceed under the FECA, if not, a FTCA suit can be maintained. The District Court performs the analysis, and this test applies to both physical and emotional harm.

2. There is a sharp division between those four (4) Circuits, and the Tenth. In the Tenth Circuit, procedurally it is left to the Secretary of Labor to determine whether an injury occurred in the employee's performance of duty. The Fourth Circuit accords complete deference to the administrative agency and that determination is final with no opportunity for judicial review. Only if the agency first determines FECA has no applicability, may a FTCA suit be advanced. This procedure is followed in both physical and emotional harm cases.

3. Isolated from the above Circuits, the Ninth Circuit alone holds that emotional distress claims with no physical injury need not be mandatorily redressed under FECA as a matter of law, permitting the FTCA suit to proceed. No job risk or hazard analysis is made, no deference is accorded to the administrative process in such cases, and FECA exclusivity, as an affirmative defense, is not available to the Government. This rule, unique among all the Circuits, only applies to emotional distress claims with no physical injury.

The First, Fourth, Fifth, and Sixth Circuit Courts of Appeals have adopted the "Zone of Danger" test to determine whether a worker was injured "while in the performance of duty." *See Wright v. United States,* 717 F.2d 254,

258 (6th Cir., 1983); *Wallace v. United States,* 669 F.2d 947, 952 (4th Cir., 1982); *Bruni v. United States*, 964 F.2d 76, 79-80 (1st Cir., 1992); *Bailey v. United States,* 451 F.2d 963, 967 (5th Cir., 1971). This test looks to whether the injury falls within the "Zone of Danger" created by the work at issue. (*See*, *infra*, at pp. 28-29)

In sharp contrast, the Tenth Circuit Court of Appeals has held that it is *always* left to the Secretary of Labor to determine whether an injury occurred in the federal employee's performance of duty. *Tippetts v. United States*, 308 F.3d 1091, 1095 (10th Cir., 2002). In that case, a postal employee was placed on administrative leave because the postal service erroneously misread his military health record concerning his history of depression (e.g., whether his history included depression *with* psychotic features should have been read *without* psychotic features). The postal service concluded that he had not been candid when he had filled out his job application, and suspended him. He was thereafter required to call in daily, but there was never any work for him. After 3½ months of this, he was fired. He filed a FTCA lawsuit, alleging intentional infliction of emotional harm and defamation. In holding that District Court deference to the administrative determination of FECA coverage is absolute, the Tenth Circuit stated:

> [3] The Secretary must determine, as an initial matter, whether a claim falls within the purview of the FECA. Id. When a claim is presented to the court without having first been submitted to the Secretary for a ruling on FECA coverage, the court must permit the Secretary to evaluate the claim if there is a substantial question that FECA coverage exists. *Farley*, 162 F.3d at 616. "A substantial question regarding [FECA]

> coverage exists unless it is certain the Secretary would not find coverage." Id. at 615-16.
>
> – *Tippetts, supra*, at 308 F.3d page 1094

See, also, the following Tenth Circuit cases: *Farley v. United States*, 162 F.3d 613 (10th Cir., 1998); *Swafford v. United States*, 998 F.2d 837 (10th Cir., 1993); *Cobia v. United States*, 384 F.2d 711 (10th Cir., 1967); *Tarver v. United States*, 25 F.3d 900 (10th Cir., 1994); *Hudiburgh v. United States*, 626 F.2d 813 (10th Cir., 1980). Consistent with its rule of absolute deference to the Secretary of Labor, the Tenth Circuit does not presume to articulate the standard by which the Labor Department must carry out its mandate.

Disengaged from all other Circuits, the Ninth Circuit Court of Appeals stands alone in holding that emotional distress claims without physical injury can be advanced under the FTCA, bypassing FECA. It reached this conclusion in *Sheehan v. United States*, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir., 1990), primarily relying upon *Guidry v. Durkin*, 834 F.2d 1465 (9th Cir., 1987), and *DeFord v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir., 1983). The importance of the procedural issues raised by this Petition should not be discounted. It is informative to contrast the case of Alex McCauley with the case of Joan Sheehan. In *McCauley v. United States*, 58 F. Supp. 2d 1232 (District Court of Kansas, 1999), the plaintiff had been the resident agent in charge of the Oklahoma Field office of ATF, located in the Murrah Building. Although in the building when Mr. McVey's terrorist act occurred, he was not physically harmed. As he helped others escape in the aftermath of the blast, he suffered extreme trauma and stress. He went into therapy, and his ATF career was

ruined. He brought suit under the FTCA but was relegated to apply under the FECA and the suit was stayed, based upon Tenth Circuit law. That procedure would have been very different in the Ninth Circuit.

Acts of murderous terrorism are by their very design also meant to wreak havoc on the souls of the survivors who, though uninjured physically, were close enough to be traumatized. While one can hope the horrors of 9/11, Oklahoma City, or Columbine-like assaults on federal enclaves such as Fairchild AFB will never re-occur, the hatred for our culture festering among our enemies, whether foreign born or our own alienated citizens, is so deep, so profound, that it may never die away. Mellberg's rampage was also an act of terror, although differing from the attacks on the Twin Towers, the Pentagon and the Murrah Building in scale (and in its predictability). This Petition, if granted, will provide this Court with the opportunity to correct the Circuits so that accidents of geography hold no sway over the rights of injured federal workers. These issues, unless decided now, will unhappily be revisited by other victims of mass assault. The competition between FECA and the FTCA will continue. The lower courts will not stop deciding the relative viability of these competing compensatory regimes. Lawyers will continue to assert new culpability devices to detour around the FECA. And the schism among the Circuits will widen unless this Court intercedes and endorses a uniform procedure.

II.

It is the Ninth Circuit's unique interpretation that the Federal Employee's Compensation Act ("FECA") does not apply to emotional distress without physical injury and that such claims may be pursued under the Federal Tort Claims Act.

A. This interpretation of the FECA was first advanced by the Ninth Circuit in *Sheehan v. United States*, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir., 1990). The Fifth, Sixth and Tenth Circuit Courts of Appeals have rejected *Sheehan*. The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Ninth Circuit Court of Appeals adheres to the view that emotional distress claims without physical injury can be advanced under the FTCA, skirting FECA, as a matter of law. It reached this conclusion in *Sheehan v. United States*, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir., 1990), primarily relying upon *Guidry v. Durkin*, 834 F.2d 1465 (9th Cir., 1987), and *DeFord v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir., 1983). But *Guidry* was a defamation case. And the Sixth Circuit subsequently relegated the *DeFord* language relied upon by *Sheehan* to "dictum" in *McDaniel v. United States*, 970 F.2d 194, 196 (6th Cir., 1992). Thus, the theoretical underpinnings of the *Sheehan* opinion, never very strong to begin with, have been significantly eroded. Yet, *Sheehan* remains the law of the Ninth Circuit. Nothing at all in the FECA Statutes summons or legitimizes this interpretation.

The Fifth, Sixth and Tenth Circuit Courts of Appeals have, by implication or by express language, rejected the

Sheehan case. The Sixth Circuit has since labeled as "dictum" the language in *DeFord v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir., 1983) relied upon in *Sheehan* by the Ninth Circuit. *McDaniel v. United States*, 970 F.2d 194, 196 (6th Cir., 1992). *See Swafford v. United States*, 998 F.2d 837, 840 (10th Cir., 1993) (rejecting *Sheehan* and explaining *McDaniel*'s limitation of *DeFord*). The Tenth Circuit recently explicitly rejected *Sheehan* again in *Tippetts v. United States*, 308 F.3d 1091, 1094-95 (10th Cir., 2002), as did the Fifth Circuit in *Bennett v. Barnett*, 201 F.3d 272, 277 (5th Cir., 2000). Thus the Fifth, Sixth, and Tenth Circuit Courts have refused to apply the Ninth Circuit rule of *per se* District Court jurisdiction under the FTCA for claims of emotional harm.

In an apparent attempt to salvage *Sheehan*, the *Moe* opinion distinguished it on the shaky basis that Ms. Moe ultimately experienced physical manifestations of her emotional distress while the *Sheehan* plaintiff did not. *Moe* opinion at App. pp. 4-6. The Ninth Circuit has not overruled *Sheehan* and it remains the law of the largest Circuit in the country.

B. The Ninth Circuit Opinion in the instant case also merits an exercise of this Court's supervisory power based upon its departure from the accepted and usual course of judicial proceedings for additional reasons. The *Moe* opinion's insistence that a worker with a solely emotional injury – compensable under the FTCA pursuant to *Sheehan* – is suddenly relegated to the FECA if that emotional injury later manifests any physical symptoms, contradicts the common law principle that "the initial wrong is the cause of all that follows," adopted in the FECA context by the Second, Third, Fifth, Sixth, and Eleventh (and even the Ninth) Circuit Courts of Appeals. Moreover, *Moe*'s claim mutation creates a procedural nightmare for litigants as to which statutory remedy to pursue at the outset of an emotional injury.

The *Moe* opinion's holding at (Appendix 4-6) that a government worker who suffers emotional injury that *causes* a physical injury must proceed under the FECA – while an otherwise identical government worker lacking such an eventual physical injury may proceed under the FTCA – conflicts with the legal principle that all damages that result from an injury that is cognizable under a particular compensation scheme remain within that scheme and cannot shift to another. The *Moe* decision thus conflicts with numerous opinions of other Circuit Courts of Appeals and substantially affects rules of national application in which there is an overriding need for national uniformity.

Relying on the common law rule that "the initial wrong is the cause of all that follows," the Eleventh Circuit

recently explained that if the original injury is covered by FECA, then its aggravation is also covered by FECA:

> The aggravation of [the plaintiff's] initial injuries, suffered while he was indubitably in performance of his duty, should be regarded as resulting from the initial injuries themselves. . . . That is the rule at common-law when the claim is for negligence; *the initial wrong is the cause of all that follows, even when there has intervened a succeeding negligent act that produced the aggravation.* We interpret the Compensation Act as a substitute for the whole of the claim that, but for it, would have arisen under the Tort Claims Act.

Noble v. United States, 216 F.3d 1229, 1235-36 (11th Cir., 2000) (emphasis in original); quoting *Wilder v. United States*, 873 F.2d 285, 288 (11th Cir., 1989) (sequelae of original injury covered by FECA could not be compensated under FTCA; quoting *Balancio v. United States*, 267 F.2d 135, 137 (2nd Cir., 1959) (Learned Hand, J.) (same)). The same should also hold true for those injuries originally covered by the FTCA, such as Ms. Moe's initial PTSD.

Regarding this well-established common law principle, *Noble* also relied upon *Lance v. United States*, 70 F.3d 1093, 1095 (9th Cir., 1995) (original injury covered by FECA so aggravation by medical malpractice also covered by FECA); *McCall v. United States*, 901 F.2d 548 (6th Cir., 1990) (sequelae of original injury covered by FECA could not be compensated under FTCA); and *Sanders v. United States*, 387 F.2d 142 (5th Cir., 1967) (same). *See also Vander v. United States*, 268 F.3d 661 (9th Cir., 2001) (aggravation of original injury covered by federal inmate compensation scheme could not be compensated under

FTCA); *Gold v. United States*, 387 F.2d 378 (3rd Cir., 1967) (alleged medical malpractice in treatment of injuries covered by FECA must also be compensated under FECA). Thus the Ninth Circuit's holding that Ms. Moe's emotional distress mutated from a FTCA claim to one under FECA because her condition later developed physical manifestations conflicts with precedent of the Second, Third, Fifth, Sixth, Eleventh, and even the Ninth Circuit Courts of Appeals. It defies reason that Ms. Moe would be denied access to the compensation scheme afforded Ms. Sheehan merely because her emotional distress became worse than Ms. Sheehan's.[1]

Moreover, this holding of the *Moe* opinion opens a procedural morass. According to Ninth Circuit precedent, because Ms. Moe's original harm involved emotional distress only, she could properly advance it initially under the FTCA. *See Sheehan v. United States*, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir., 1990). But the *Moe* opinion now holds that once emotional distress manifests as any amount or type of physical symptom the worker must abandon his or her FTCA claim in favor of the FECA. As a practical matter, there is always the possibility that emotional injuries will lead to physical ones. The panel

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[1] The worsening of Ms. Moe's condition will ironically result in a denial of any compensation for permanent disability under the FECA. Such disabilities are compensated according to statutory and regulatory schedules found at 5 U.S.C. § 8107 and 20 C.F.R. § 10.404, respectively. "Colon" and "ileum" are not found on either schedule. The Employees' Compensation Appeals Board has held that there is no compensation under FECA for injury to body parts not on these schedules. *In Re Edgar L. Pake*, 35 E.C.A.B. 1011 (1984) (no compensation for "coronary heart condition, myocardial infarction, and coronary artery disease" because "heart" not on schedules).

decision below effectively requires every such plaintiff to either be prescient about the future course of recovery when choosing whether to advance the claim under the FTCA or the FECA, or to start off pursuing both. Conflicting time lines pose considerable problems in that regard, particularly if the plaintiff chooses wrong in the first place. Various scenarios emerge regarding these conflicts when one compares 5 U.S.C. §§ 8119 and 8122 and 20 C.F.R. §§ 10.100-10.101 with 28 U.S.C. § 2401. Thus, Ms. Moe submits the opinion below confronts practitioners and litigants with a tangled skein of procedural choices to be made only at their peril.

In summary, the common law principle that "the initial wrong is the cause of all that follows" holds that the aggravation of Ms. Moe's ulcerative colitis and her subsequent ileostomy were causally linked to the initial emotional injuries she suffered due to Dean Mellberg's rampage. They are part and parcel of her original injury, and as such, are compensable just as the initial injury would have been. The *Moe* opinion is thus at odds with the previous holdings of a majority of the Circuit Courts of Appeals and should be reversed on this issue as well.

III.

Under current law, the lower Federal Courts recognize and fulfill a judicial oversight role, subject to both Congressional and Constitutional limitations. This case raises an important question of Federal Law that should be settled by this Court. Unless this Court accepts review and sets forth a clear standard regarding "performance of duty," similarly situated litigants will continue to be treated differently in different parts of the country.

The "door-closing statute," 5 U.S.C. § 8128(b), precludes judicial review of FECA rulings by the Secretary of Labor, where an injury has been administratively determined to be within coverage of the Act. The Secretary of Labor is authorized to decide all questions arising under the FECA, 5 U.S.C. § 8145, and to promulgate regulations necessary to administer the Act, 5 U.S.C. § 8149. The Secretary, in turn, has delegated his powers conferred under §§ 8145 and 8149 to the Director of the Office of Worker's Compensation, (OWCP) who carries out the FECA. 20 C.F.R. § 10.2. Pursuant to Congressional delegation, the Secretary has created the Employee's Compensation Appeals Board, or ECAB, to hear and finally determine appeals of decisions made by the OWCP. 5 U.S.C. § 8149; 20 C.F.R. § 10.625-10.626. An aggrieved claimant can request a record review by OWCP (5 U.S.C. § 8124, 20 C.F.R. § 10.618); or request a reconsideration within one year; (5 U.S.C. § 8128, 20 C.F.R. § 10.607); or, within one year, file an Appeal with ECAB (20 C.F.R. § 10.625-10.626).

There is no judicial review of the administrative decisions under FECA. 5 U.S.C. §§ 8116, 8128(b):

> The action of the Secretary or her designee in allowing or denying a payment under this subchapter is –
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and,
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.
>
> – 5 U.S.C. § 8128(b)

This Court has upheld this preclusion of review provision barring any judicial review of the administrative determinations of FECA coverage. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 779-780, 105 S. Ct. 1620, 84 L. Ed. 2d 405 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90, 112 S. Ct. 486, 116 L. Ed. 2d 405 (1991). Opinions in the Seventh, Eighth, Eleventh and Ninth Circuits follow those teachings. *Czerkies v. United States Dep't of Labor*, 73 F.3d 1435 (7th Cir., 1996) (en banc); *Brumley v. United States Dep't of Labor*, 28 F.3d 746 (8th Cir., 1994), cert. denied, 513 U.S. 1082, 115 S. Ct. 734, 130 L. Ed. 2d 637 (1995); *Woodruff v. United States Dep't of Labor*, 954 F.2d 634 (11th Cir., 1992); *Rodrigues v. Donovan*, 769 F.2d 1344 (9th Cir., 1985).

A limited judicially created exception to § 8128(b) has been recognized to address substantial Constitutional claims that amount to more than benefits appeals disguised as Constitutional deprivations. *See Johnson v. Robison*, 415 U.S. 361, 367, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974); *Czerkies*, 73 F.3d at 1441-43; *Rodrigues*, 769 F.2d at 1348; *Paluca v. Secretary of Labor*, 813 F.2d 524, 526-27 (1st Cir.), cert. denied, 484 U.S. 943, 108 S. Ct. 328,

98 L. Ed. 2d 355 (1987). Thus, the Seventh Circuit has held:

> The circuits are in agreement: "door-closing statutes do not, unless Congress expressly provides, close the door to Constitutional claims, provided that the claim is colorable and the claimant is seeking only a new hearing or other process rather than a circuit award of money by the district court. One does not, of course, need a statute to close the doors of the court to claims that are insubstantial, . . ."
>
> – *Czerkies v. United States Dep't of Labor*, *supra* 73 F.3d 1435 at p. 1439; *see, also, Paluca v. Secretary of Labor*, *supra*.

In addition to the review of substantial claims of Constitutional deprivation, the lower Courts have been called upon to rule upon FECA exclusivity when raised as an affirmative defense by the Government, to defeat an FTCA claim filed by a Governmental employee whose claim bears some relationship to federal employment. The Court must then determine whether the injury or disease has arisen from the performance of duty. 5 U.S.C. §§ 8101, 8102. It is axiomatic that this judicial oversight role occur, since a finding by the Secretary that the harm fell outside of the performance of duty, hence outside of FECA, may leave a claimant without any remedy at all, as notice and limitations rules may bar a later untimely FTCA filing. Some degree of judicial intervention is thus inevitable in ruling upon the affirmative defense of FECA exclusivity where raised by the Government. This Court should now determine and settle an important question of federal law,

and define the standard by which "performance of duty" issues are to be determined by the lower Courts.

IV.

Great deference should be accorded to the longstanding administrative interpretation of the Federal Employee's Compensation Act (FECA) by the Labor Department. *Cutler's* Rule also known as the "Zone of Danger Test," has worked well in the First, Fourth, Fifth and Sixth Circuits. The time has come to make it uniform throughout the United States.

The District Court Judge in the case at bar was presented by the Government with a Declaration and attached memorandum submitted by E. Martin Walker in support of the Motion to Dismiss based upon FECA exclusivity. The Court reviewed this somewhat self-serving pleading prepared in contemplation of this litigation, and reasoned from it as follows:

> The Government bases its claim that there is substantial question as to FECA coverage on the fact that sometime in 2000, Ms. Krawiec requested the Acting Director for Federal Employees' Compensation, Office of Workers' Compensation Programs, department of Labor to review Ms. Moe's Complaint and her administrative claims to express an opinion as to whether there is a significant possibility that Ms. Moe may be covered under FECA for her injuries. On November 20, 2000, E. Martin Walker, Acting Deputy Director responded with an equivocal opinion that there is such a significant possibility stating that "if plaintiff submits medial evidence

based on a proper factual and medical background establishing that she has an emotional condition or a physical condition **that is causally related to factors of her federal employment**, she would be entitled to compensation under the FECA." (Emphasis added).

The remainder of the opinion letter indicates that there is no possibility that Ms. Moe could submit proper factual and medical background to establish that her emotional condition is causally related to factors of her federal employment. For example, the letter states:

> While the allegations of the complaint appear to indicate that plaintiff Marilyn Moe was performing her work duties as a federal employee at the time of Dean Mellberg's shooting rampage on June 20, 1994, **this alone does not compel a finding of coverage under the FECA.**

The letter continues:

> When an employee experiences **an emotional reaction to her regular or special assigned employment duties or to a requirement imposed by the employment, or has fear and anxiety regarding her ability to carry out her duties,** and the medical evidence establishes that her disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the coverage of the FECA. On the other hand, where the disability results from an employee's emotional reaction to employment matters, **but such matters**

are not related to the employee's regular or special assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within coverage of the FECA.

Where the evidence demonstrates that **the employing agency neither erred nor acted abusively in the administration of personnel matters, coverage under the Act is not afforded.**

(Emphasis added).

There is nothing in this case to suggest that the shooting spree of Mellberg had anything at all to do with Plaintiff's employment duties. Ms. Moe's emotional distress is not related in any way to her work duties or the requirement of her employment. Mellberg was not a supervisor or employee at Fairchild, nor was he a patient involving Plaintiff's duties from which her emotional distress derived.

The opinion letter also states "assaults **arise out of employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.**" (Emphasis added.) Again, there is nothing in this case to suggest that the risk of the Mellberg shooting spree was increased because of the nature or setting of Ms. Moe's work or that the reason for the shooting spree was a quarrel having its origin in Ms. Moe's work.

> The letter also states that "to establish entitlement to compensation for disability from work under the FECA, **the claimant must demonstrate that she has an emotional condition causally related to factors of her federal employment ...**" There is simply no evidence in this case that Ms. Moe's emotional condition as the result of the Mellberg shooting spree was causally related in any way to factors of her federal employment.
>
> – District Court's Order Denying Motion to Dismiss, *Inter alia* (App. 14-17). *See also*, Declaration of E. Martin Walker and his attached Memorandum (App. 28-29 and 30-26).

Mr. Walker's submission was a restatement of *Cutler's* Rule, so-named for the decision regarding Lillian Cutler, 28 ECAB 125 (1976). That rule has become a benchmark in the implementation of the FECA, and has achieved hornbook status, which suggests its general and widespread acceptance in the FECA setting:

> **§ 1050. Presentation of FECA Claim: The Prima Facie Case – Performance of Duty – Emotional Reactions to Workplace Decisions**
>
> If a practitioner intends to assist FECA claimants, he or she must be familiar with *Cutler's* Rule. The essentials of this rule are:
>
> Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment ...

> Where the disability results from his emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.
>
> – West's Federal Administrative Practice, 4th ed., Vol. 1, § 1050, at p. 640 (2002), footnotes omitted.

Cutler's Rule has defined the term "in the performance of duty" for over twenty-five (25) years in the administrative context relating to FECA coverage. The United States Supreme Court accords great deference to the interpretation given to any statute by the officers directed to implement the law on a day to day basis:

> [7-10] When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n of Territory of Alaska v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 250, 91 L. Ed. 136. *See also* e.g., *Gray v. Powell*, 314 U.S. 402, 62 S. Ct. 326, 86 L. Ed. 301; *Universal Battery Co. v. United States*, 281 U.S. 580, 583, 50 S. Ct. 422, 74 L. Ed. 1051. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried

> and new.'" *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408, 81 S. Ct. 1529, 1535, 6 L. Ed. 2d 924.
>
> – *Udall v. Tallman*, 380 U.S. 1, 85 S. Ct. 792, quoting from 801, 13 L. Ed. 2d 616 (1965). Accord: *Zenith Radio Corp. v. United States*, 437 U.S. 443, 98 S. Ct. 2441, 2445, 57 L. Ed. 2d 337 (1978); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 101 S. Ct. 2239, at 2241, 68 L. Ed. 2d 744 (1981).

The origins of the judicial standard upon which to decide Motions to Dismiss FTCA lawsuits based upon the FECA exclusivity defense, it is submitted, should trace back to *Cutler's* Rule. This Rule provides a workable, practical and objective standard that should be made uniform throughout all the Circuits. It has been called the "Zone of Danger" test, and has been adopted by and worked well in four (4) federal Circuits.

The First, Fourth, Fifth, and Sixth Circuit Courts of Appeals rely upon the "Zone of Danger" test to determine whether a worker was injured in the performance of duty.[2]

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[2] In this context, "Zone of Danger" is the functional equivalent of *Cutler's* Rule, and has an entirely different meaning than the same term "Zone of Danger", when it is employed in the FELA cases (Federal Employer's Liability Act). FELA applies to injuries to employees resulting from negligence in the limited context of interstate railroads. See, *Consolidated Rail Corp. v. Gotshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). This contradictory use of the same term by some Circuits regarding similar federal compensation regimes (one fault-based, one no-fault) only promotes and fosters confusion.

(Continued on following page)

See Wright v. United States, 717 F.2d 254, 258 (6th Cir., 1983); *Wallace v. United States*, 669 F.2d 947, 952 (4th Cir., 1982); *Bruni v. United States*, 964 F.2d 76, 79-80 (1st Cir., 1992); *Bailey v. United States*, 451 F.2d 963, 967 (5th Cir., 1971). In *Wright*, the Sixth Circuit held there was no FECA coverage because ". . . being injured by the negligent application and use of a respirator is not an expected consequence of being within the Special Zone of Danger which surrounds secretarial positions at a Veterans Administration hospital." 717 F.2d at 258. In *Bailey*, the worker's injuries were not connected to the ". . . usual hazards of laundry work" and were thus not covered by FECA. 451 F.2d at 967. In *Wallace*, the Fourth Circuit, in applying the "Special Zone of Danger" test, noted ". . . that the mere fact that the injury occurred while the employee was on the premises of his federal employer is not controlling." 669 F.2d at 952. (This obviously contradicts the *Moe* opinion's holding that Ms. Moe was injured in the performance of duty merely because her job placed her at the location of the rampage. *Moe* opinion at App. 7.) Moreover, being injured by a separated, vengeful, psychotic former airman is not an expected consequence of being within a Special Zone of Danger which surrounds secretarial positions at an Airforce base hospital. Ms. Moe's injuries were not connected to the usual hazards of office work at a hospital. In short, her PTSD and her ulcerative colitis, both diseases, were **not** proximately caused by her employment. 5 U.S.C. § 8101(5).

Clarification and re-definition of the "Zone of Danger" test, to the end that this contradiction is removed, provides yet another reason for the Supreme Court to grant this Petition.

CONCLUSION

There is at present an irreconcilable conflict among the Circuits. That conflict should be resolved so that only one uniform standard by which to judge FECA exclusivity as an affirmative defense in the FTCA context is applied throughout the Circuits. Both the Ninth and the Tenth Circuits are too extreme in their respective approaches. With regard to FTCA liability for emotional harm without physical injury, the Ninth Circuit's holdings rejecting FECA exclusivity in emotional injury cases clearly exceed Congressional intent. *Sheehan v. United States*, should be overruled. That Circuit also steps away from reason with the *Moe* opinion below, as it violates both principle and precedent that the initial wrong is the cause of all that follows. *Cutler's* Rule should become the measure by which to judge "performance of duty" in all Federal Circuits. On the basis of *Cutler's* Rule, petitioner Moe's injuries were not related to her usual or specially assigned duties or to a requirement of her employment as a clerical worker in a small, family practice clinic. The Ninth Circuit should be overruled, and the case remanded to the District Court of the Eastern District of Washington for further proceedings under the FTCA.

For all of the above reasons, Petitioner Moe requests that her Petition for a Writ of Certiorari be granted by this Court.

DATED this 18th day of July, 2003.

Respectfully submitted,

J. ADAM MOORE
JUDSON R. MOORE
217 North 2nd Street
Yakima, WA 98901
Telephone (509) 575-0372
Facsimile (509) 452-6771

MARK E. VOVOS
Counsel of Record
1309 West Dean, Suite 100
Spokane, WA 99201
Telephone (509) 326-5220
Facsimile (509) 326-5226

Attorneys for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARILYN MOE, *Plaintiff-Appellee*, v. UNITED STATES OF AMERICA, *Defendant-Appellant*.	No. 02-35198 D.C. No. CV-96-00348-JLQ OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, Senior District Judge, Presiding

Argued and Submitted
February 14, 2003 – Seattle, Washington

Filed April 18, 2003

Before: Melvin Brunetti, Thomas G. Nelson, and
Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Thomas G. Nelson

COUNSEL

Robert D. McCallum, Jr., Assistant Attorney General, Washington, D.C., for the defendant-appellant.

J. Adam Moore, Yakima, Washington, for the plaintiff-appellee.

OPINION

T.G. NELSON, Circuit Judge:

The Government appeals the district court's denial of its motion to dismiss for lack of subject matter jurisdiction

in this Federal Tort Claims Act ("FTCA") action. Because we hold that psychological injury accompanied by physical injury, regardless of the order in which they occur, is within the scope of the Federal Employee's Compensation Act ("FECA"), the district court lacked jurisdiction over Marilyn Moe's claim. We vacate and remand to the district court.

I. BACKGROUND

Moe, a federal employee, was an administrative assistant at a medical facility on the Fairchild Air Force Base. On June 20, 1994, Dean Melberg, a recently discharged Air Force serviceman, went on a shooting rampage at the medical facility. He killed four people and wounded twenty-three others before he was killed.

During the shooting, Moe ran from the facility, putting herself into Melberg's direct line of fire. Although Moe was not shot, she suffered from Post-Traumatic Stress Disorder (PTSD) from the shooting incident. Her PTSD aggravated her preexisting ulcerative colitis, requiring the removal of her colon.

Moe timely filed an administrative claim under the FTCA. When her administrative claim was denied, she filed suit in district court under the FTCA seeking damages for her physical and psychological injuries. The Government moved to dismiss for lack of subject matter jurisdiction, claiming that FECA provided Moe's exclusive remedies and preempted her FTCA claims. The district court denied the motion, and we granted the Government's petition for an interlocutory appeal.

II. ANALYSIS

We review de novo the district court's refusal to dismiss for lack of subject matter jurisdiction.[1] We have jurisdiction pursuant to 28 U.S.C. § 1292(b).

A. *FECA Coverage*

FECA requires the Government to "pay compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."[2] To qualify, the employee must apply to the Secretary of Labor.[3] FECA's exclusivity provision bars recovery under the FTCA, providing that "[t]he liability of the United States . . . under this subchapter . . . is exclusive and instead of all other liability of the United States . . . to the employee . . . and any other person otherwise entitled to recover damages from the United States . . . under a Federal tort liability statute."[4] In other words, if compensation is available under FECA, all other statutory remedies for claims arising under the same facts are preempted.

FECA claims raise two questions: (1) is the injury within the scope of FECA, and (2) is the plaintiff entitled to compensation under the facts of her case.[5] The latter question, if raised, must be deferred to, and answered by,

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[1] *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002).

[2] 5 U.S.C. § 8102(a) (2001).

[3] 5 U.S.C. § 8145.

[4] 5 U.S.C. § 8116(c).

[5] *Figueroa v. United States*, 7 F.3d 1405, 1407-08 (9th Cir. 1993).

the Secretary of Labor.[6] Scope, on the other hand, is a question that must be answered by the federal courts, because it is one of jurisdiction.[7] If a plaintiff has a colorable claim under FECA, the federal courts should dismiss any action arising under the same facts for lack of subject matter jurisdiction.[8]

In this case, the parties dispute whether Moe's type of claim is covered under FECA. Thus, we must decide if Moe's injury is of the "type" covered by FECA.[9] If it is, FECA preempts Moe's FTCA claims, and her case should be dismissed for lack of jurisdiction.

B. *Moe's Injuries are Within the Scope of FECA*

Two things are clear about the personal injuries FECA covers: a claim for compensation must result from physical injury[10] and emotional injury, "divorced from any claim of physical harm," is outside FECA's scope.[11] This circuit has not addressed whether psychological injury, which results in physical injury, is within FECA's scope. That is the precise question before us, and we hold that it is.

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[6] *Id.* at 1408.

[7] *Sheehan v. United States,* 896 F.2d 1168, 1174 (9th Cir. 1990).

[8] *Figueroa,* 7 F.3d at 1408.

[9] *Id.* (holding that in cases where FECA is an issue, the court must determine whether the "type" of injury claimed is statutorily covered by FECA, and anything beyond the question of scope, such as compensation, should be left to the Secretary of Labor to determine).

[10] *Id.*

[11] *Sheehan,* 896 F.2d at 1174.

A plaintiff need only allege a colorable claim under FECA for our courts to lose jurisdiction over an FTCA action.[12] In *Figueroa v. United States*,[13] the plaintiffs were exposed to toxic chemicals, resulting in immediate and potential future physical harm.[14] Dismissing the case for lack of jurisdiction, we acknowledged that FECA "contemplates coverage for a [physical] condition produced over a long period of time by 'stress'" *and* the "*emotional distress* that *results from* the stress of being exposed . . . to a toxic substance that could cause future physical harm."[15] Thus, FECA covers emotional distress when it results from physical injuries that FECA covers.

Moe argues that *Figueroa*'s holding requires physical injuries to occur first, and that the emotional injuries are covered when they arise from the physical injuries. We see no reason for the chronological order of physical and psychological injuries to impact FECA's scope. Congress designed FECA to provide immediate compensation to federal employees, regardless of fault, eliminating the need to litigate those claims.[16] In return, employees lose the right to sue the Government.[17] We would do nothing to further this purpose by requiring physical injuries to occur before FECA would cover a psychological injury. Therefore, we hold that FECA covers psychological injuries when

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[12] *Figueroa*, 7 F.3d at 1408.

[13] 7 F.3d 1405.

[14] *Id.* at 1407.

[15] *Id.* at 1408 (second emphasis in original).

[16] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193-94 (1983).

[17] *Id.*

accompanied by physical injuries, regardless of the order in which they occur.

In this case, Moe suffered from PTSD, a psychological injury. As a result of her PTSD, Moe's colitis condition was aggravated to the point where her colon had to be removed. This is clearly a physical injury that occurred because of the shooting incident at her place of employment. Therefore, we hold that this is the "type" of injury FECA covers, and Moe has alleged a colorable claim under the act.

C. *Moe's Injuries Occurred While in the Performance of Her Duties*

Regardless of the type of Moe's injuries, she would have us conclude that her injuries did not occur *while in the performance of her duties* because her injury did not come at the hands of a coworker or from her assigned work duties. This argument lacks merit. FECA provides compensation to a federal employee for injuries "sustained while in the performance of [her] duty."[18] Neither the statute nor caselaw requires that the employee's job-related duties or a coworker cause the injury.[19]

FECA's plain language supports our conclusion. The statute covers injuries that occur "while in the performance

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[18] 5 U.S.C. § 8102(a).

[19] *See Saltsman v. United States*, 104 F.3d 787, 790 (6th Cir. 1997); see also *Reep v. United States*, 557 F.2d 204, 208 (9th Cir. 1977) (holding that FTCA action was properly dismissed because there was a substantial question of FECA coverage when an off-duty police officer, on his way to work, was struck by an enlisted man).

of [one's] duty."[20] It neither limits the injuries to those that occur at the hand of another federal employee, or from the specific assigned duties.

In a factually analogous case from the Sixth Circuit, *Saltsman v. United States*,[21] an employee at a military base went on a shooting rampage, injuring and killing federal employees.[22] The employees and the decedent employees' families filed actions under the FTCA.[23] The Sixth Circuit dismissed the case for lack of subject matter jurisdiction, holding that FECA provided the exclusive remedy.[24] The fact that the employees were not engaged in work tasks when they were injured did not affect the court's analysis.

Moe was at work when the shooting occurred. In fact, she ran from her office into Melberg's direct line of fire. Although her employer did not require her to work in that specific location, her job placed her in this situation. Thus, we hold that Moe sustained her injuries while in the performance of her duties.

D. *The Government is Not Estopped from Arguing Lack of Subject Matter Jurisdiction*

After Moe's FTCA administrative claim was denied, the air force sent Moe a letter saying that she was now

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[20] 5 U.S.C. § 8102(a).

[21] 104 F.3d 787 (6th Cir. 1997).

[22] *Id.* at 788.

[23] *Id.* at 788-89.

[24] *Id.* at 790.

free to file suit in federal court. Relying on this letter, Moe claims that the Government is estopped from arguing that the court lacks jurisdiction to hear her claim under the FTCA. This argument is also without merit. Jurisdiction is at issue in all stages of a case.[25] Accordingly, the Government is not estopped from questioning the court's jurisdiction.

III. CONCLUSION

Moe alleged a claim that was colorable under FECA because she sustained emotional injuries that resulted in physical injuries, while in the performance of her duties as a federal employee. Because FECA provides Moe's exclusive remedy, the courts lack jurisdiction over her FTCA claim. Jurisdiction is an issue at any stage of the proceedings, and the Government was not estopped to assert its jurisdictional argument. Accordingly, we vacate and remand to the district court.

VACATED and REMANDED.

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[25] FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *see also Joyce v. United States*, 474 F.2d 215, 219 (9th Cir. 1973) (per curiam) (vacating FTCA claim for lack of jurisdiction, even though the jurisdictional issue was not raised until after the trial began).

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 02-35198
CT/AG#: CV-96-00348-JLO

MARILYN MOE

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA

Defendant-Appellant

(Filed Jun. 20, 2003)

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is VACATED and REMANDED.

COSTS TAXED

Filed and entered April 18, 2003

A TRUE COPY
ATTEST

CATHY CATTERSON
Clerk of Court

by: /s/ Ruben Talavera
Deputy Clerk

This certification does constitute the mandate of the court.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

MARILYN MOE, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant	NO. CS-9 6-348-JLQ ORDER DENYING MOTION TO DISMISS, **INTER ALIA** (Filed Mar. 26, 2001)

BEFORE THE COURT is Defendant's Motion for Leave to Cite Unpublished Employees' Compensation Appeals Board Opinions; and Defendant's Second Motion to Dismiss, heard telephonically on March 22, 2001. Debra L. Stephens appeared on behalf of Plaintiff. Margaret E. Krawiec appeared on behalf of Defendant. Having reviewed the record, heard from counsel, and being fully advised in this matter, **It Is Hereby Ordered** that Defendant's Motion for Leave to Cite Unpublished Opinions is **Denied** and Defendant's Second Motion to Dismiss is **Denied** for the following reasons.

1. Defendant's Motion for Leave to Cite Unpublished Opinion

Defendant seeks to cite unpublished Opinions of the Employees' Compensation Appeals Board in support of it's [sic] Second Motion to Dismiss. This request is entirely contrary to both the Ninth Circuit Rule and the Eastern District of Washington Local Rule. Ninth Circuit Rule 36-3 provides:

> Any disposition that is not an opinion or an order designated for publication . . . shall not be regarded as precedent and **shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders,** except when relevant under the doctrines of law of the case, res judicata or collateral estoppel.

"The terms of Circuit Rule 36-3 must be strictly followed." *Thomas v. Newton International Enterprises*, 42 F.3d 1266, 1272 (9th Cir. 1994); *In Re Burns*, 974 F.2d 1064, 1068 (9th Cir. 1992).

Likewise, Eastern District of Washington Local Rule 7.1(g)(2) provides in pertinent part:

> **Unpublished decisions may not be cited**, except that (1) unpublished Ninth Circuit decisions may be cited in accordance with Circuit Rule 36-3, and (b) unpublished Eastern District of Washington decisions may be cited when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. **Decisions are 'published' only when available or pending publication in official state or federal reports.** Decisions available only in looseleaf services, slip opinion or electronic databases are not published.

The Government does not even suggest that the unpublished opinions it wishes to cite are relevant under the doctrines of law of the case, res judicata or collateral estoppel. Therefore, it is clear that under Ninth Circuit law, the Government's Motion for Leave to Cite Unpublished Opinions must be and is **Denied**.

2. Defendant's Second Motion to Dismiss

A. Background

Marilyn Moe was working in her position as an administrative assistant in the Family Practice unit at the Fairchild Air Force Base Hospital on June 20, 1994 when Dean Mellberg began shooting, and she ran from the building placing her in Mellberg's direct line of fire. Ms. Moe was not physically injured, but has been diagnosed with Post Traumatic Stress Disorder attributable to her experience during the shooting incident, which subsequently produced objective physical symptoms, including the worsening of pre-existing ulcerative colitus [sic], resulting in an ileostomy.

On September 15, 1995, Ms. Moe timely filed her administrative claim with the United States Air Force identifying her injuries as "Post Trauma Stress Syndrome; Internal Aggravation; and Removal of Colon. The United States Air Force denied this claim on April, 1996, without any reference to FECA, but which advised Ms. Moe that she "may now file suit in an appropriate United States District Court not later than six months after the date of the mailing of this letter." Ms. Moe timely filed this action under the Federal Tort Claims Act (FTCA).

B. Discussion

The Government claims that Plaintiff's Complaint should be dismissed because Plaintiff's exclusive remedies are available through the Federal Employees Compensation Act (FECA), a federal workers compensation statute. The Government contends that FECA expressly bars an injured federal employee who may be eligible for FECA benefits from proceeding under the FTCA until the Secretary

of Labor is provided with the opportunity to make a determination as to the employee's FECA liability.

Ms. Moe claims that the injuries she suffered are not work related injuries and are thus beyond the scope of FECA; that Defendant should be estopped from making such a claim; and that if the court finds the Government is correct, this action should be stayed rather than dismissed to allow Plaintiff the opportunity to file a claim under FECA.

Before an action may be instituted under the FTCA, if there is a substantial question as to whether an injured federal employee's injuries are covered under the FECA, the injured employee must first seek and be denied relief by the Secretary of Labor. If, on the other hand, there is no substantial question as to FECA coverage, the injured employee may commence an action under the FTCA. *Reep v. United States*, 557 F.2d 204, 206 (9th Cir. 1977).

If a plaintiff's alleged injury is emotional distress divorced from any claim of physical harm, her injuries are not covered by FECA, and there is no substantial question as to FECA coverage. *Sheehan v. United States*, 896 F.2d 1168 (9th Cir., 1990), *modified at* 917 F.2d 424; *Bartlett v. United States*, 835 F. Supp. 1246 (E.D. WA, 1993). "FECA compensates government employees only for physical harm . . . Sheehan's alleged injury – emotional distress – is divorced from any claim of physical harm . . . because a claim for emotional distress is not covered by FECA, FECA is not the employee's exclusive remedy." *Sheehan*, 896 F.2d at 1173. (Citations omitted).

The Government bases its claim that there is substantial question as to FECA coverage on the fact that sometime in 2000, Ms. Krawiec requested the Acting Director

for Federal Employees' Compensation, Office of Workers' Compensation Programs, Department of Labor to review Ms. Moe's Complaint and her administrative claims to express an opinion as to whether there is a significant possibility that Ms. Moe may be covered under FECA for her injuries. On November 20, 2000, E. Martin Walker, Acting Deputy Director responded with an equivocal opinion that there is such a significant possibility stating that "**if** plaintiff submits medical evidence based on a proper factual and medical background establishing that she has an emotional condition or a physical condition **that is causally related to factors of her federal employment**, she would be entitled to compensation under the FECA." (Emphasis added).

The remainder of the opinion letter indicates that there is no possibility that Ms. Moe could submit proper factual and medical background to establish that her emotional condition is causally related to factors of her federal employment. For example, the letter states:

> While the allegations of the complaint appear to indicate that plaintiff Marilyn Moe was performing her work duties as a federal employee at the time of Dean Mellberg's shooting rampage on June 20, 1994, **this alone does not compel a finding of coverage under the FECA.**

The letter continues:

> When an employee experiences **an emotional reaction to her regular or special assigned employment duties or to a requirement imposed by the employment, or has fear and anxiety regarding her ability to carry out her duties**, and the medical evidence establishes that her disability resulted from an emotional

> reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the coverage of the FECA. On the other hand, where the disability results from an employee's emotional reaction to employment matters, **but such matters are not related to the employee's regular or special assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within coverage of the FECA.**
>
> Where the evidence demonstrates that **the employing agency neither erred nor acted abusively in the administration of personnel matters, coverage under the Act is not afforded.**

(Emphasis added).

There is nothing in this case to suggest that the shooting spree of Mellberg had anything at all to do with Plaintiff's employment duties. Ms. Moe's emotional distress is not related in any way to her work duties or the requirement of her employment. Mellberg was not a supervisor or employee at Fairchild, nor was he a patient involving Plaintiff's duties from which her emotional distress derived.

The opinion letter also states "assaults **arise out of employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.**" (Emphasis added). Again, there is nothing in this case to suggest that the risk of the Mellberg shooting spree was increased because of the nature or

setting of Ms. Moe's work or that the reason for the shooting spree was a quarrel having its origin in Ms. Moe's work.

The letter also states that "to establish entitlement to compensation for disability from work under the FECA, **the claimant must demonstrate that she has an emotional condition causally related to factors of her federal employment** . . . " There is simply no evidence in this case that Ms. Moe's emotional condition as the result of the Mellberg shooting spree was causally related in any way to factors of her federal employment.

The Government relies on *Reep*, *supra*, and *Saltzman v. United States*, 104 F.3d 787 (6th Cir. 1997).

In *Reep*, a civilian federal employee who had been struck while crossing the street to go to work by an automobile operated by an enlisted serviceman brought an action against the United States under the Federal Tort Claims Act. Reep's claimed injuries were all physical injuries, there was no claim of emotional distress.

On its fact, the case of *Saltzman v. United States*, 104 F.3d 787 (6th Cir. 1997) seems very similar to this one. In *Saltzman* a shooting attack **by a worker** at a military base injured or killed co-workers. Representatives of deceased workers and workers' family members brought an action against the United State [sic] pursuant to the Federal Tort Claims Act. The district court dismissed the suit and held that the FECA provides the exclusive remedy for claims against the United States relating to work-place injuries and wrongful death of federal employees. The Sixth Circuit affirmed. The court found that the spouses and children of the injured employees, who sought damages, inter alia, for emotional distress and loss of consortium were

covered under FECA because the claims sought damages with respect to the injury or death of themselves or of a loved one who was an employee. Here, Mr. Mellberg was not an employee and Ms. Moe's claimed injuries have nothing to do with the with the [sic] physical injury of herself or of physical injury or death of a loved one who was an employee.

The *Saltzman* court distinguished *Sheehan v. United States*, *supra*, 896 F.2d 1168 (9th Cir. 1990) because the emotional distress claim in *Sheehan* was divorced from any claim of physical harm, whereas the emotional distress claim in *Saltzman* stemmed from physical harm to the plaintiffs or the plaintiffs' loved ones on the job.

In *Figueroa v. United States*, 7 F.3d 1405 (9th Cir. 1993), the court distinguished between the two cases of *Reep* and *Sheehan*, and clarified the reasoning between those two holdings.

The court noted that there are two types of FECA coverage questions. The first question is whether FECA covers a particular type of injury. This is a question of the scope of coverage, appropriate for the district court to decide, as was the case in *Sheehan*.

The other type of coverage question is whether a plaintiff is entitled to compensation under the facts of a particular event. This question requires a determination of such facts as "whether the injury . . . occurred while the employee was on the job . . . This is a question of coverage in and of itself which is subject to *Reep*.

In *Figueroa*, government employees were injured while cleaning up a toxic spill on a naval base in Guam, who sued the Government under the Federal Tort Claims

Act. The plaintiffs sought damages for both current and potential physical injuries and for emotional distress resulting from their fear they would develop cancer from their exposure at some later date. The court held that the claims were properly dismissed to allow the Secretary of Labor to resolve the question of whether the plaintiffs' claims were covered by the FECA:

> In this instance, Plaintiffs' claims are colorably under the FECA. **Plaintiffs' alleged mental distress injuries are tied to physical harm both potential and actual. As a result of their exposure to the PCBs, and after suffering some medical problems**, Plaintiffs are concerned about developing cancer . . . .
>
> . . .
>
> Moreover, the Department of Labor has determined that **emotional distress may be considered a disability when it arises from a worker's emotional reaction to a requirement imposed by the employment.**

Id. at 1407-08 (Emphasis added).

Here, to the contrary, it is Ms. Moe's claim that as a result of the shooting spree by Mellberg, who was not a federal employee and which caused her no physical injury, she suffered post traumatic stress disorder, which subsequently resulted in physical injury as well. Plaintiff's alleged mental distress injuries did not result from a job related duty, nor did it arise from her emotional reaction to a requirement imposed by her employment. Mr. Mellberg was not a co-worker of Ms. Moe and neither Ms. Moe, nor any of her loved ones was shot or received any physical injury as a result of the shooting sprees.

For the foregoing reasons, the court is satisfied that Ms. Moe's claims are not causally related to her work, and therefore are beyond the scope of the FECA. Ms. Moe's alleged injury, emotional distress, and resulting physical injuries are divorced from any claim of physical harm. Because a claim for emotional distress is not covered by FECA, FECA is not the employee's exclusive remedy, and Defendant's Second Motion to Dismiss is **Denied**. Therefore, the court need not address where the Government should be estopped from claiming that Plaintiff's claim [sic] are covered by FECA.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 23rd day of March, 2001

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

MARK E. VOVOS, P.S.
West 1309 Dean Avenue
Delphi Building, Suite 100
Spokane, Washington 99201-2014
(509) 326-5220

ADAM MOORE
Law Offices of Adam Moore
217 North 2nd Street
Yakima, Washington 98901
(509) 575-0372

Attorneys for Plaintiff

MARGARET E. KRAWIEC
Trial Attorney
U.S. Department of Justice
Torts Branch, Civil Division
Post Office Box 888
Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-4288

Attorney for United States

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

MARILYN MOE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CIVIL ACTION NO. CS-96-0348-JLQ MEMORANDUM IN SUPPORT OF PARTIES' JOINT MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

This action is one of eighteen separate actions brought against the United States pursuant to the Federal Tort

Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, *et seq.*, arising out of the shootings that took place at Fairchild Air Force Base on June 20, 1994. The United States filed a motion to dismiss Plaintiff's action on the ground that the action is barred by the Federal Employees Compensation Act (FECA) based upon its belief that FECA serves as Plaintiff's exclusive remedy for the alleged injuries she suffered as a result of the shooting. The Court denied this motion on March 23, 2001.

With the exception of this case, all other cases were settled at a Mediation conducted by United States Magistrate Judge Lonny Suko. Before engaging in Mediation, the parties understood that the United States would not engage in settlement discussions with Plaintiff Marilyn Moe in light of the legal significance of the disputed FECA issues. The parties now agree that a motion seeking certification for interlocutory appeal of the Court's Order denying the United States' Motion to Dismiss and the United States' Motion for Reconsideration or Certification for Interlocutory Appeal should now be granted and respectfully move for such certification for interlocutory appeal.[1] A proposed order is herewith submitted for the convenience of the Court.

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[1] In addition to this jointly submitted memorandum, the United States also respectfully requests that the Court consider the reasons already asserted in the United States' Memorandum in Support of United States' Second Motion to Dismiss, the United States' Reply Brief in Support of Defendant United States' Second Motion to Dismiss and its Memorandum in Support of United States' Motion for Reconsideration or Certification for Interlocutory Appeal.

DISCUSSION

Pursuant to 28 U.S.C. § 1292(b), a district court may certify for interlocutory appeal an order, not otherwise appealable, (1) that involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) where an immediate appeal may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). An analysis of these three elements supports this Court's certification of its Order for interlocutory appeal.[2]

First, questions relating to subject matter jurisdiction are considered controlling questions of law. *See Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 768 (9th Cir. 1992). Accordingly, the finding by this Court's conclusion that Plaintiff's claim is not covered by the FECA is a controlling question of law in this case.

Second, the United States contends that the Ninth Circuit cases decided after *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990), have held that a claim of emotional distress is a cognizable injury under FECA. *See Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994) (deeming plaintiff's post-traumatic stress disorder to be an injury covered by FECA); *Figueroa v. United States*, 7 F.3d 1405

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[2] "While the individual elements of the statutory criteria may be examined separately for purposes of analysis and a decision may occasionally find one or another of them lacking [ ], in practice the courts treat the statutory criteria as a unitary requirement, and the decisions granting and discussing interlocutory appeal under 28 U.S.C. § 1292(b) uniformally cite all three of the elements as being present in any particular case." 19 Moore's Federal Practice 3D § 203.30-86 (Matthew Bender & Co., Inc. 1997).

(9th Cir. 1993) ("FECA also contemplates coverage for a condition of emotional distress that results from the stress of being exposed in a discrete event to a toxic substance that could cause future physical harm.")

In contrast, Plaintiffs contend that as the Ninth Circuit held in *Figueroa v. United States*, 7 F.3d 1405 (1993) and *Sheehan v. United States*, 896 F.2d 1168 (1990), as modified at 917 F.2d 424), if a plaintiff's injury is emotional distress divorced from any claim of physical harm that plaintiff's injuries are not covered by FECA. *See also Bartlett v. United States*, 835 F. Supp. 1236 (E.D. Wash. 1993). Because there is substantial ground for these differences of opinion regarding the controlling legal standard, the parties agree that an appeal is appropriate at this time.

Finally, reversal by the court of appeals would lead to Plaintiff's claims being either dismissed or stayed in order for the Secretary of Labor to make a determination as to whether or not FECA applies. If the action is stayed and the Secretary of Labor determines that FECA applies, this FTCA action must be dismissed. On the other hand, final affirmance and remand to the District Court with the FECA issues decided in Plaintiff's favor would remove what is now an impediment to the ultimate termination to this litigation.[3]

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[3] Plaintiff advances the additional argument that extraordinary circumstances now exist that warrant reconsideration of prior contrary orders. Fed. R. Civ. P. 60(b). Specifically, if the United States' contentions regarding FECA are ultimately sustained on appeal following a trial, the cost to a lone plaintiff of that trial would be burdensome.

CONCLUSION

For all of above reasons, instead of proceeding to trial on this remaining Plaintiff's claim, and in the interest of judicial economy, both parties agree that these issues should be resolved on appeal at this time.

Respectfully submitted,

/s/ Mark E. Vovos
MARK E. VOVOS

/s/ Adam Moore 12-5-01
ADAM MOORE

Attorneys for Plaintiff

/s/ Marilyn Moe
MARILYN MOE
Plaintiff

/s/ Margaret E. Krawiec
MARGARET E. KRAWIEC

Attorney for United States

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

MARILYN MOE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	CIVIL ACTION NO. CS-96-0348-JLQ

ORDER

(Filed Dec. 17, 2001)

The Court hereby certifies pursuant to 28 U.S.C. § 1292(b) that its Orders denying the United States' Second Motion to Dismiss and the United States' Motion for Reconsideration or Certification for Interlocutory Appeal involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Dated this 12th day of December, 2001.

/s/ Justin L. Quackenbush
United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARILYN MOE, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant.	No. 02-35198 D.C. No. CV-96-00348-JLQ Eastern District of Washington, Spokane ORDER (Filed Jun. 5, 2003)

Before: BRUNETTI, T.G. NELSON, and RAWLINSON, Circuit Judges.

The panel has voted to deny Appellee's petition for panel rehearing. Judge T.G. Nelson and Judge Rawlinson vote to deny the petition for rehearing en banc and Judge Brunetti so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Rule 35, Federal Rules of Appellate Procedure.

The petition for rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

MARILYN MOE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	CIVIL ACTION NO. CS-96-0348-JLQ

DECLARATION OF E. MARTIN WALKER

I, E. Martin Walker, do hereby state and declare that:

1. I am the Acting Deputy Director for Federal Employees' Compensation, Office of Workers' Compensation Programs (OWCP), United States Department of Labor, and as part of my duties and responsibilities, I have been delegated the responsibility for administering the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 *et seq*.

2. I was provided and have reviewed a copy of the complaint filed by plaintiff Marilyn Moe in the above-captioned matter, and the administrative claim filed with the Department of the Air Force prior to the filing of the complaint.

3. I directed a search to be made of the records of OWCP, which disclosed that no claim for compensation pursuant to the FECA has been filed by plaintiff Marilyn Moe with the OWCP based on the events of June 20, 1994, when Dean Mellberg went on a shooting rampage at Fairchild Air Force Base in Spokane, Washington.

4. I was asked to render an opinion concerning the question of whether the FECA would cover any injuries sustained by plaintiff as a result of the events of June 20, 1994 at Fairchild Air Force Base.

5. I issued an opinion, a true and correct copy of which is attached hereto as *Exhibit A*, which concluded that "there is a significant possibility that a claim by plaintiff Marilyn Moe for compensation for an emotional condition and/or a physical condition as a result of the events of June 20, 1994 at Fairchild Air Force Base would be covered under the FECA."

6. This opinion is based upon the assumption that all factual statements in the documents provided to me are true and that no additional facts material to a determination on FECA coverage in this matter exist.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on November 20, 2000. 28 U.S.C. § 1746.

/s/ E. Martin Walker
E. MARTIN WALKER
Acting Deputy Director for
Federal Employees'
Compensation Office of
Workers' Compensation
Programs United States
Department of Labor

November 20, 2000

MEMORANDUM FOR: Margaret Krawiec, Esq.
Trial Attorney, United States
Department of Justice

FROM: E. Martin Walker
/s/ E. Martin Walker
Acting Deputy Director for
Federal Employees'
Compensation

SUBJECT: *Marilyn Moe v. United States*
Civil Action No.
CS-96-0348-JLQ (ED WA)

This is in response to your request for an opinion whether any medical condition which developed as a result of the events of June 20, 1994 when Dean Mellberg went on a shooting rampage at Fairchild Air Force Base in Spokane, Washington, would be covered under the Federal Employees' Compensation Act (FECA). The opinion expressed herein is based upon the facts alleged in plaintiff's complaint filed in the above-referenced action, a copy of which I have been provided and have reviewed. I have also reviewed a copy of the administrative claim filed under the Federal Tort Claims Act (FTCA) with the Department of the Air Force. Actual adjudication of a claim presented pursuant to the FECA based upon the events set forth in the complaint and in the administrative claim (and its attachments) may disclose different or additional facts that substantially affect the ultimate determination of this matter.

Upon review of the allegations of the complaint and the administrative claim, I conclude that there is a significant possibility that plaintiff may be covered under the FECA

for both an emotional condition and a physical condition causally related to factors of her federal employment.[1] The complaint alleges that plaintiff "was employed as an administrative assistant (clerk/typist) for Family Practice at the [Fairchild Air Force] Base Hospital"; that on June 20, 1994 she "was working in the Family Practice office when the shooting began and she ran from the building"; and that "(w)hen she left the building, she was directly in the line of fire from the shooting going on behind her." Complaint, pp. 4-5, ¶ V. (N). The complaint alleges further that, as a result of the events of June 20, 1994, plaintiff "has incurred medical and psychological expenses, loss of past and future earning capacity, and emotional distress past and future." Complaint, p. 12, ¶ IX.[2] The complaint also alleges that plaintiff filed an administrative claim with the Department of the Air Force. Complaint, p. 12, ¶ XI. The administrative claim filed with the Department of the Air Force describes plaintiff's injury as "post trauma stress syndrome; internal aggravation; removal of colon." Documents attached to the administrative claim indicate that plaintiff had problems with ulcerative colitis following the events of June 20, 1994, and subsequently underwent an ileostomy on December 6, 1994.

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[1] The fact that a claimant's injury or disease is covered under the FECA does not necessarily mean that the claimant will receive compensation. To establish entitlement to compensation for disability from work under the FECA, the claimant must demonstrate that she has an emotional condition causally related to factors of her federal employment, and must also show that this condition resulted in disability from work.

[2] This section of the complaint refers to a different plaintiff; I have assumed that this was a typographical error. In all other sections of the complaint, the plaintiff is consistently identified as Marilyn Moe.

While the allegations of the complaint appear to indicate that plaintiff Marilyn Moe was performing her work duties as a federal employee at the time of Dean Mellberg's shooting rampage on June 20, 1994, this alone does not compel a finding of coverage under the FECA. The Employees' Compensation Appeals Board (ECAB) has held that workers' compensation is not applicable to each and every injury or illness that is somehow related to the employment.

In *Lillian Cutler*, 28 ECAB 125 (1976), the ECAB discussed at length the principles applicable to alleged employment-related emotional conditions and the distinctions as to the type of employment situation giving rise to an emotional condition which will be covered under the FECA. When an employee experiences an emotional reaction to her regular or special assigned employment duties or to a requirement imposed by the employment, or has fear and anxiety regarding her ability to carry out her duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the coverage of the FECA. On the other hand, where the disability results from an employee's emotional reaction to employment matters, but such matters are not related to the employee's regular or special assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the coverage of the FECA. (In *Cutler*, the ECAB held that the claimant's disability from her disappointment in not receiving a promotion did not constitute an injury sustained in the performance of duty.)

Where the evidence demonstrates that the employing agency has neither erred nor acted abusively in the administration of personnel matters, coverage under the Act is not afforded. *Samuel F. Mangin, Jr.*, 42 ECAB 671 (1991); *Richard J. Dube*, 42 ECAB 916 (1991). The ECAB has held that difficult relations with supervisors and coworkers can constitute a factor of employment. *Lawrence C. Mar*, 42 ECAB 723 (1991); *Abe E. Scott*, 45 ECAB 164 (1993).[3] In addition, the ECAB has held that emotional reactions to stressful events that occur in the course of employment activity can result in coverage under the Act. For example, in *Larry J. Thomas*, 44 ECAB 291 (1992), the ECAB found that, where a rural letter carrier came upon a young boy (approximately 14 years old) who had apparently just committed suicide next to his mailbox, this incident constituted a compensable factor of employment, and any emotional reaction to this incident would be covered under the Act. Noting that the "requirement that [Thomas] deliver the mail placed [Thomas] at the mailbox where he discovered the suicide victim[,]" the ECAB found that "since his employment placed him in the place of injury, his injury is covered under the Act." *Larry J. Thomas*, 44 ECAB at 299.

Regarding assaults occurring in the workplace, in *Sylvester Blaze*, 37 ECAB 851, 853 (1986), the ECAB quotes from professor Larson's treatise on workers' compensation law as follows:

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[3] It is also clear that intentional actions of supervisors and coworkers can constitute compensable factors of employment under the FECA. *See Arlene F. Stidham*, 46 ECAB 674 (1995).

> Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.

Similarly, where a postal employee sustained injuries in a confrontation with a postal inspector, the ECAB found that the claimed injuries were sustained in the performance of duty because the injuries would not have occurred had the employee "not been misinformed by the SPO [supervisory postal official] as to who was waiting in the Postmaster's office and the nature of his visit." *Robert J. Eglinton*, 40 ECAB 195, 200-201 (1988).

The complaint contains allegations of events to which plaintiff Marilyn Moe was exposed at work on June 20, 1994 which, if established, could be considered factors of employment under *Cutler* analysis. These include the allegations in section V of the complaint regarding the shooting rampage by Dean Mellberg on that date, and include the allegation that when she ran out of the building, plaintiff was "directly in the line of fire from the shooting going on behind her." Complaint, pp. 4-5, ¶ V. (N). If established as having occurred, these incidents could constitute factors of employment under *Cutler* analysis, and any emotional condition resulting from the events of June 20, 1994 would be covered under the FECA.

In addition to coverage for emotional conditions, physical conditions that result from employment-related exposure to emotional stress are compensable under the Act. See *Charlet Garrett Smith*, 47 ECAB 562, 564 (1996), in which the ECAB held that once the work-connected character of any condition is established, the "subsequent progression of that condition remains compensable so long as the

worsening is not shown to have been produced by an independent nonindustrial cause." In *Smith*, reversing an OWCP decision denying compensation benefits for total disability commencing September 11, 1992, the ECAB found that the claimant's treatment for symptoms of sleep disturbance, nightmares, anxiety, depression, gastrointestinal distress, and headaches following participation in a July 15, 1992 training class "was the direct and natural result of her employment-related post-traumatic stress disorder." *Smith*, 47 ECAB at 565; *see also John T. Russell, II*, 46 ECAB 536 (1995). In her administrative claim filed with the Department of the Air Force, plaintiff claimed that the removal of her colon was related to the stress of the events of June 20, 1994. Should plaintiff submit sufficient medical evidence to establish that the removal of her colon was related to the stressful events of June 20, 1994, such physical condition would be covered under the Act.

Based on the foregoing discussion, and on the allegations of the complaint, plaintiff Marilyn Moe might be able to establish that she sustained an emotional condition (post-traumatic stress syndrome) and/or a physical condition (aggravation of ulcerative colitis, resulting in the surgical removal of her colon) as a result of the events of June 20, 1994. If plaintiff submits medical evidence based on a proper factual and medical background establishing either that she has an emotional condition or a physical condition that is causally related to factors of her federal employment, she would be entitled to compensation under the FECA.

Based on the facts alleged in the complaint, absent some contradictory information which has not been provided to me, I conclude that there is a significant possibility that a

claim by plaintiff Marilyn Moe for compensation for an emotional condition and/or a physical condition as a result of the events of June 20, 1994 at Fairchild Air Force Base would be covered under the FECA.[4]

[4] Section 8122(a) of the FECA (5 U.S.C. § 8122(a)) provides a three-year time limitation for filing a timely claim. In addition, 5 U.S.C. § 8122(a)(1) provides an exception to the three-year time limitation where the immediate superior had actual knowledge of the injury or death within 30 days. This actual knowledge must be sufficient "to put the immediate superior reasonably on notice of an on-the-job injury or death[.]" In a case of latent disability, 5 U.S.C. § 8122(b) provides that "the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment."

Paul M. Wert, Ph.D.
Clinical Psychology

July 24, 1995

Mr. Mark Vovos,
Attorney at Law
1309 West Dean
Spokane, WA 99201

Re: Moe, Marilyn

Dear Mr. Vovos:

Following a referral from your office, as well as from the office of Yakima attorney Adam Moore, Marilyn Moe (DOB 10/08/52) was seen for the purpose of psychological assessment. Marilyn was first interviewed face-to-face on June 14, 1995, with a second face-to-face interview conducted on June 22, 1995. As you know, Marilyn Moe was working at the hospital at Fairchild AFB outside of Spokane o [sic] June 20, 1994. It was on this day that Dean Nellberg was involved in a "shooting spree" at the hospital which resulted in death and injury to some of those present. Although Marilyn Moe was not physically injured at the time of the shooting, it is my understanding that there is concern on your part, as well as on the part of other involved parties, that Marilyn has suffered psychological and emotional problems associated with her proximity to and involvement in the incident.

In addition to face-to-face interviewing on the dates outlined above, on June 22, 1995 Marilyn Moe was also administered an objective personality inventory, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2).

In way of briefly recounting Marilyn's past history, she reported that she was born in Midland, Michigan on October 8, 1952. She was born to Robert and Mildred Moe.

Marilyn is the third of five children born to her parents. Her oldest sister, Linda, is 47 years of age and is a teacher's aide. Her next oldest sister, Carol, is 46 years of age and is a school bus driver. Marilyn's brother, James, is 44 years of age and is a master plumber. Marilyn's younger sister, Mary, is 42 years of age and is employed as a phlebotomist. All of Marilyn's siblings live in the state of Michigan, with the exception of Mary, who lives in Arizona.

Marilyn was raised in an intact family. She describes her family as being "very close and supportive." Her father worked for the Dow Corning corporation for a number of years, most often as a forklift driver. Marilyn's mother did not work outside of the home until her later years when she worked as a bus driver. Both parents are now retired.

According to Marilyn, her mother was the primary disciplinarian in the family. She stated that her mother would use "grounding" and occasionally spank Marilyn in her younger years with a ping pong paddle. Concerning the spankings, however, Marilyn stated "they were appropriate." According to Marilyn, she experienced a few years during her teens when her relationship with her mother was "rocky." She stated, however, that as an adult she has been very close to both parents and is close to her siblings as well.

Marilyn attended Bullock Creek Elementary School in Midland from kindergarten through the 6th grade. She stated that she enjoyed school and remarked "I had a lot of friends." She was typically a B student. Marilyn later attended Bullock Creek High School. She attended this school from the 7th grade through part of the 12th grade. According to Marilyn, she did well in high school until she

was part way through her last year. Prior to that time, she enjoyed sports and was well-adjusted socially. Part way through her 12th grade year in school, however, she began drinking alcohol and in fact was drinking quite heavily. Part way through the year, Marilyn and three other individuals hitchhiked to the San Diego, California area. Once in San Diego, Marilyn obtained a part-time job and attended school at night in order to receive her high school degree. Marilyn remained in San Diego for one year. At that time, she returned to Midland because she stated she "missed my family." Once back in Midland, however, Marilyn stated that she began "partying." In August of 1972, however, she enlisted in the U.S. Army. She remained for eight years. During that time she was initially stationed in Louisiana and later in Texas. During her last four years in the service, she was stationed in Germany.

Just prior to going to Germany, at age 21 she married Roy Samuel. Roy Samuel traveled with Marilyn to Germany. According to Marilyn, however, her rapid advancement in rank was somewhat threatening to her husband and they divorced in 1978. By that time they were living in the state of Texas.

Following her divorce from Roy Samuel, Marilyn met a man by the name of Francisco Martinez. Marilyn and Francisco were married in late 1978. In April of 1979 Francisco was killed in a motorcycle accident. It was around this same time that Marilyn was discharged from the Army. At the time of her discharge, she was on the promotion list for E-7.

Following the death of her second husband, Marilyn went to Kansas City, Missouri where friends were living. She remained there for one year. During this time, she was

working for the U.S. Postal Service. After living in Kansas City for one year, she moved to Los Alamedos, California. She obtained a civil service job with an Army Reserve unit. She was involved in clerical work. This was in 1980. During this time, Marilyn was living with a Major in the Army. She moved with this man briefly to Niagara Falls, New York, but returned to California when he received orders to go to Panama.

While attending an academy at March AFB, Marilyn met Mike Hicks. They began dating and Marilyn came to Spokane with Mike Hicks in August of 1991. Mike Hicks, who was in the Air Force, had recently divorced his wife. Mike's daughter, along with Marilyn, moved into a home at Clear Lake. In January of 1995, Mike Hicks received orders for a transfer to Grand Forks AFB, North Dakota. According to Marilyn, Mike has four years left to retire.

Since arriving in Spokane, Marilyn obtained a civil service job at Fairchild AFB. She is anticipating that she will obtain a similar position once she is settled in North Dakota. According to Marilyn, she has two years left before she will have 20 years in with the civil service.

According to Marilyn, on June 20, 1994 she was working in the family practice clinic in the hospital at Fairchild AFB. Marilyn's office was by the pediatrics clinic. According to Marilyn, there was apparently an announcement about a gunman in the building, but Marilyn could not hear the announcement in her office. She stated that two staff people came running through, however, and told her there was a gunman right behind them. They proceeded out of the building. According to Marilyn, she began running for an exit. Apparently, Dean Mellberg pushed in a fire door with his body and, while pointing his weapon in

Marilyn's direction, shot out a glass window right next to emergency doors through which Marilyn was exiting. She recalls being afraid that Mellberg was behind her and following her. She stated that she ran across a parking lot and dove into bushes for cover. It was while lying flat on the ground that she realized Dean Mellberg had not in fact followed her out. While lying in the bushes, Marilyn could see a woman running, who then fell after being shot.

After joining other people outside, Marilyn was taken to an old ambulance maintenance building. She felt unsafe in the building, as there was only one door and a small window. She was concerned that there would be no avenue of escape should the gunman come into the facility. She stated that she was shaking, crying, and added "my imagination was going crazy."

Subsequent to June 20, 1994, Marilyn stated that she almost immediately began experiencing intrusive recollections of "what else could have happened." She stated "I was very fortunate and should have been shot." She began experiencing nightmares almost immediately, with one or two nightmares per night. She stated that she would wake up crying, fearful that someone would be in their home. According to Marilyn, she now has nightmares every week to two weeks, of which the content is associated with the incident. In asking to specifically recount one of her nightmares, she stated "I can see his face, he's in dark clothing, he's smiling and I'm in the room, the only thing in the room, and I'm crouching in the corner looking up at him." She stated that in the dream the weapon does not discharge, but that there is "just the barrel of the gun pointed at me."

In addition to the intrusive recollections and recurrent dreams, Marilyn also at various times has felt as if the incident, or something similar, were recurring. She cited, for example, that she was in a grocery store not long after the incident occurred. She thought she heard a gun discharge and jumped under the vegetable counter. She later learned that someone had dropped a bottle of Coca-Cola. She stated that Mike Hicks found her under the vegetable counter crying. She stated that since the time of the incident, she has been unable to read about or watch shows on television which have violence. She stated that previous to the incident, she would watch such shows as "911." She stated, however, that she will not do so now.

She also stated that the week previous to our June 22, 1995 appointment she traveled to Michigan in order to attend the funeral of a cousin. Once there, however, she realized that she could not do so. She stated "I wasn't thinking about Sharon (her cousin) in the casket, but as being out in the field."

Marilyn appears to make a clear effort to avoid situations which might remind her of the incident at Fairchild. She stated "everything I do all day long, I think about where I'm going to be, what I'm going to do." She stated that she avoids crowds altogether. She stated that the week previous to our last appointment she was in the airport at Chicago and was very reluctant to board an airplane, as she felt there was a "strange" individual who was also getting on. Marilyn stated that prior to the incident she was participating in aerobics classes, but is unable to do so now as a result of her fear of being in groups. She also feels that she is not as social as she was previously. She stated "I get to my home and feel secure." She added "I used to be very sociable." According to Marilyn, she also

feels that she is more angry, irritable, and prone to depression than she was previous to June 20, 1995. She stated "I'll start crying and I'm not sure why." She stated that anything around the topic of death is difficult for her to talk about.

According to Marilyn, she initially experienced significant sleep disturbance. She stated that more recently she will experience initial sleep disturbance, most frequently when she is alone. She also stated, however, that she needs to leave a hall light on and always plans an escape from her bedroom. According to Marilyn, she feels she has become increasingly irritable at times subsequent to the Fairchild incident. She stated that she experiences problems with concentration at times while working. She is clearly hypervigilant. She has exaggerated startle responses to noises which resemble a discharge of a weapon, such as the incident previously mentioned at the store, and when these incidents occur she clearly experiences physiologic reactivity. She tries to avoid restaurants, grocery stores, and malls, but when she cannot do so she experiences accelerated heart rate when in these situations. She stated that she "goes in and out fast."

On the Tuesday night prior to our last appointment, Marilyn watched a television show commemorating the one year anniversary of the incident at Fairchild. She stated that the following night she could not leave her bedroom without Mike Hicks accompanying her. She stated that when she attempted to do so, she would "see a dark figure with a gun." She stated "I couldn't even feel safe in my own house."

In the months following the incident at Fairchild, Marilyn experienced problems with ulcerative colitis, which was

originally diagnosed 12 years ago. Subsequent to June 20, 1994, she experienced a serious "episode." Within one month, her weight went from 126 pounds to 98 pounds. She was hospitalized at Sacred Heart Medical Center for one week. She was then sent home for four to five days. The medication which was prescribed was not effective, however, and in December of 1994 she underwent an ileostomy. She underwent a recovery period in January. From March through June of this year she also has experienced considerable hair loss. The etiology of this is unknown. In general, however, she felt it was "all the stress, I was really under a lot of stress there for six months."

Although Marilyn experienced problems as a result of alcohol abuse during her earlier years, she terminated her use of alcohol in 1982. At that time, she involved herself in a 14 day inpatient treatment program in Orange County, California. According to Marilyn, "I knew it was time to get some help." Marilyn has been entirely abstinent from alcohol since that time. She stated that her mate, Mike Hicks, drinks alcohol only occasionally.

As mentioned previously, Marilyn Moe was administered an objective personality inventory, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). The interpretive information which follows should be viewed as only one source of hypotheses about the individual being evaluated. No decisions should be based solely on the information contained in this report. This material should be integrated with all other sources of information in reaching professional decisions about this individual.

The obtained MMPI-2 was valid. The client clearly attempted to answer test questions in an open and honest

fashion. The validity scores indicate, however, that the individual is openly acknowledging significant psychological distress at this time. Individuals with similar scores on the validity scales may feel that they have somewhat limited personal resources to deal with existing problems.

Concerning configural clinical scale interpretation, individuals with similar codetypes are oftentimes experiencing physical ailments. Their medical problems may at times be exhibited with some degree of agitation. Such individuals are likely to be described at times as irritable and may be difficult to interact with. Interpersonal relationships of individuals with similar codetypes are oftentimes characterized by conflict concerning the acceptance of assistance versus dependency. However, they see their home life as being essentially pleasant. Women with similar codetypes are not always interested in stereotypic female activities. They may have interests that would closely more approach stereotypic masculine activities, such as an enjoyment of sports, outdoor activities, etc.

In way of summation, Marilyn Moe presented as an intelligent and hard-working individual. Although she has had problems with alcohol dependency and abuse, she has throughout the majority of her adult life functioned responsibly and pro-socially. Subsequent to the incident at Fairchild AFB on June 20, 1994, Marilyn has experienced clear symptoms compatible with a diagnosis of Post Traumatic Stress Disorder. She has experienced a number of symptoms compatible with a diagnosis of PTSD as described above. In addition to clear PTSD symptoms, she has also experienced an exacerbation of a previously diagnosed condition of ulcerative colitis. This exacerbation is most probably a result of the stress Marilyn has experienced subsequent to June 20, 1994. Marilyn's Post Traumatic

Stress Disorder symptomology, along with increased medical problems, can be directly attributable to sequelae subsequent to the incident at Fairchild AFB on June 20, 1994.

Concerning recommendations, it may be helpful for Marilyn to seek psychological and/or psychiatric help in order to reduce the severity and intensity of her symptoms. Perhaps such help would be available at the Grand Forks AFB in North Dakota or in that vicinity.

I hope that this information will be of some help to you in the management of this case. Thank you for referring Marilyn Moe for assessment. Please feel free to call or write if I can be of further assistance.

Diagnosis

Axis I – 303.90 Alcohol dependence, by history, currently in remission
309.81 Post Traumatic Stress Disorder, acute onset

Axis II – No diagnosis

I am duly licensed as a clinical psychologist in the state of Washington to practice psychology. I testify and affirm that the statements in this report are accurate and true to the best of my knowledge.

Sincerely,

/s/ Paul M. Wert, Ph.D.
Paul M. Wert, Ph.D.
Licensed Psychologist

PMW:tmn

ADDITIONAL FECA STATUTES AND REGULATIONS CITED IN THE PETITION

Compensation schedule

(a) If there is permanent disability involving the loss, or loss of use, of a member or function of the body or involving disfigurement, the employee is entitled to basic compensation for the disability, as provided by the schedule in subsection (c) of this section, at the rate of 66 2/3 percent of his monthly pay ...

(1) ....

(2) ....

(3) ....

(b) ....

(1) ....

(2) ....

(c) The compensation schedule is as follows:

(1) Through (12) lists arms, legs, hands, feet, eyes, thumbs, toes, and fingers lost, and weeks of compensation.

(22) For permanent loss or loss of use of any other important external or internal organ of the body as determined by the Secretary, proper and equitable compensation not to exceed 312 weeks compensation for each organ so determined shall be paid in addition to any other compensation payable under this schedule.

– 5 U.S.C. § 8107

Notice of injury or death

An employee injured in the performance of his duty, or someone on his behalf, shall give notice thereof. Notice of a death believed to be related to the employment shall be given by an eligible beneficiary specified in section 8133 of this title, or someone on his behalf. A notice of injury or death shall –

(a) be given within 30 days after the injury or death;

(b) be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed;

(c) be in writing;

(d) state the name and address of the employee;

(e) state the year, month, day, and hour when and the particular locality where the injury or death occurred;

(f) state the cause and nature of the injury, or, in the case of death, the employment factors believed to be the cause; and

(g) be signed by and contain the address of the individual giving the notice.

– 5 U.S.C. § 8119

Time for making claim

(a) An original claim for compensation for disability or death must be filed within 3 years after the injury or death. Compensation for disability or death, including medical care in disability

cases, may not be allowed if claim is not filed within that time unless—

(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death; or

(2) written notice of injury or deaths specified in section 8119 of this title was given within 30 days.

(b) In a case of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.

(c) The timely filing of a disability claim because of injury will satisfy the time requirements for a death claim based on the same injury.

(d) The time limitations in subsections (a) and (b) of this section do not—

(1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed; or

(2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative; or

(3) run against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances.

– 5 U.S.C. § 8122

Findings and award; hearings

(a) The secretary of Labor shall determine and make a finding of facts and make an award for or against payment of compensation under this subchapter after—

(1) considering the claim presented by the beneficiary and the report furnished by the immediate superior; and

(2) completing such investigation as he considers necessary.

(b)(1) Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary. At the hearing, the claimant is entitled to present evidence in further support of his claim. Within 30 days after the hearing ends, the Secretary shall notify the claimant in writing of his further decision and any modifications of the award he may make and of the basis of his decision.

– 5 U.S.C. § 8124

What rules govern the administration of the FECA and this chapter?

In accordance with 5 U.S.C. 8145 and Secretary's Order 5-96, the responsibility for administering the FECA, except for 5 U.S.C. 8149 as it pertains to the Employee' Compensation Appeals Board, has been delegated to the Assistant Secretary for Employment Standards. The Assistant Secretary, in turn, has delegated the Authority and responsibility for administering the FECA to the Director of the Office of Workers' Compensation Programs (OWCP). Except as otherwise provided by law, the Director, OWCP and his or her designees have the exclusive authority to administer, interpret and enforce the provisions of the Act.

– 20 C.F.R. § 10.1

What do the rules contain?

This part 10 sets forth the regulations governing administration of all claims filed under the FECA, except to the extent specified in certain particular provisions. Its provisions are intended to assist persons seeking compensation benefits under the FECA, as well as personnel in the various Federal agencies and the Department of Labor who process claims filed under the FECA or who perform administrative functions with respect to the FECA. This part 10 applies to part 25 of this chapter except as modified by part 25. The various subparts of the part contain the following:

– 20 C.F.R. § 10.2

How and when is a notice of traumatic injury filed?

(a) . . . .

(b) . . . .

(1) If the claim is not filed within three years, compensation may still be allowed if notice of injury was given within 30 days or the employer had actual knowledge of the injury or death within 30 days after occurrence. This knowledge may consist of written records or verbal notification. An entry into an employee's medical record may also satisfy this requirement if it is sufficient to place the employer on notice of a possible work-related injury or disease.

(2) OWCP may excuse failure to comply with the three-year time requirement because of truly exceptional circumstances (for example, being held prisoner of war).

(3) . . . .

(c) . . . .

– 20 C.F.R. 10.100

How and when is a notice of occupational disease filed?

(a) . . . .

(b) For occupational diseases sustained as a result of exposure to injurious work factors that occurs on or after September 7, 1974, a notice of occupational disease must be filed within three years of the onset of the condition. (The form contains the necessary words of claim.) The requirements for timely filing are described in § 10.100(b)(1) through (3).

(c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

– 20 C.F.R. 10.101

When and how is compensation for a schedule impairment paid?

Compensation is provided for specified periods of time for the permanent loss or loss of use of certain member, organs and functions of the body. Such loss or loss of use is known as permanent impairment. Compensation for proportionate periods of time is payable for partial loss or loss of use of each member, organ or function. OWCP evaluates the degree of impairment to schedule members, organs and functions as defined in 5 U.S.C. 8107 according to the standards set forth in the specified (by OWCP) edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment.

(a) 5 U.S.C. 8107(c) provides a list of schedule members. Pursuant to the authority provided by 5 U.S.C. 8107 (c)(22), the Secretary has added the following organs to the compensation schedule for injuries that were sustained on or after September 7, 1974:

Members listed are:

Breast (one). . . .

Kidney (one). . . .

Larynx. . . .

Lung (one). . . .

Penis. . . .

Testicle (one). . . .

Tongue. . . .

Ovary (one). . . .

Uterus/cervix and vulva/vagina. . . .

(b) . . . .

(c) . . . .

(1) . . . .

(2) . . . .

(d) . . . .

– 20 C.F.R. 10.404

What is the time limit for requesting reconsideration?

(a) An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date.

(b) . . . .

(c) . . . .

– 20 C.F.R. 10.607

How is a review of the written record conducted?

(a) The hearing representative will review the official record and any additional evidence submitted by the claimant and by the agency. The hearing representative may also conduct whatever investigation is deemed necessary. New evidence and arguments are to be submitted at any time up to the time specified by OWCP, but they should be submitted as soon as possible to avoid delaying the hearing process.

– 20 C.F.R. 10.618

REVIEW BY THE EMPLOYEE' COMPENSATION APPEALS BOARD (ECAB)

What kinds of decisions may be appealed?

Only final decisions of OWCP may be appealed to the ECAB. However, certain types of final decisions, described in this part as not subject to further review, cannot be appealed to the ECAB. Decisions that are not appealable to the ECAB include: Decisions concerning the amounts payable for medical services, decisions concerning exclusion and reinstatement of medical providers, decisions by the Director to review an award on his or her own motion, and denials of subpoenas independent of the appeal of the underlying decision. In appeals before the ECAB, attorneys from the Office of the Solicitor of Labor shall represent OWCP.

– 20 C.F.R. 10.625

Who has jurisdiction of cases on appeal to the ECAB?

> While a case is on appeal to the ECAB, OWCP has no jurisdiction over the claim with respect to issues which directly relate to the issue or issues on appeal. The OWCP continues to administer the claim and retains jurisdiction over issues unrelated to the issue or issues on appeal and issues which arise after the appeal as a result of ongoing administration of the case. Such issues would include, for example, the ability to terminate benefits where an individual returns to work while an appeal is pending at the ECAB.
>
> – 20 C.F.R. 10.626
